BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of the	)	
	)	CC Docket No. 00-175
Biennial Regulatory Review 2000	)	

BIENNIAL REVIEW 2000 COMMENTS OF THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 785-0081

Its Attorneys

October 10, 2000

TABLE OF CONTENTS

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of the	)	
	)	CC Docket No. 00-175
Biennial Regulatory Review 2000	)	

BIENNIAL REVIEW 2000 COMMENTS
OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA")[1] hereby submits its Comments in response to the Staff Report for the Biennial Review 2000.[2] CTIA addresses herein the suggestion that the Commission consider lifting the CMRS spectrum cap, privatize the assignment of system identification numbers (SIDs) for cellular carriers, streamline environmental assessment requirements, and eliminate redundant rules. In addition, CTIA reiterates its request that the Commission modify its PCS license renewal rules to conform with those governing cellular service -- consistent with stated Commission intent. Eliminating or amending these regulations will ensure that market forces continue to spur growth in CMRS services, while reducing regulatory obligations that unnecessarily burden both CMRS providers and the Commission.

---

1 CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

2 Biennial Review 2000 Staff Report Released, *Public Notice*, FCC 00-346 (rel. Sep. 19, 2000) ("Staff Report").

CTIA enthusiastically endorses the staff's analytical framework employed for this biennial review. Specifically, the decision to "maximize the potential for self-correcting market action, and to suggest deregulatory action warranted by economic and technological developments," will ensure that vigorous competition in all segments of the telecommunications market is fostered.[3] In addition, consideration by the staff of "factors such as the effect a rule has on competitive entry into specific services . . . the effect of the rule on costs for the industry and the agency, and whether developments in the definition and structure of the relevant market would suggest that the elimination or modification of the rule is appropriate" is consistent with Congress' intent expressed in Section 11 of the Act.[4]

Under this framework, it is clear that the spectrum cap should be repealed. The cap is a vestige of traditional wireless regulation that is no longer necessary to foster competition. Moreover, it will serve mostly as an obstacle to the provision of advanced wireless services which could be deployed in the near future. In addition, CTIA concurs with the staff suggestion to review SID assignment procedures. Privatization of cellular SID assignment would reduce the Commission's responsibilities without having any detrimental effect on CMRS service. CTIA supports the assignment of these responsibilities to CIBERNET, the present manager for SID assignment to broadband PCS carriers. Finally, while not specifically addressed in the staff report, the Commission should use this opportunity to correct an unintended anomaly in its rules -- namely, the disparate renewal procedures for cellular and PCS operators.

---

3 Id. at ¶ 19.

4 Id.

PART 20 -- COMMERCIAL MOBILE RADIO SERVICES, SECTION 20.6 -- CMRS SPECTRUM AGGREGATION LIMIT

In the 1998 Biennial Review, the Commission declined to lift the CMRS spectrum cap, pledging instead to revisit this matter in the 2000 biennial review.[5] It concluded that a bright-line test, such as the spectrum cap, is preferable to a case-by-case review of proposed CMRS ownership arrangements as is typical in most other industries.[6] While CTIA believes that the spectrum cap should have been eliminated at least two years ago, maintaining the cap any further is no longer tenable. If the Commission is genuinely interested in using the Section 11 biennial review process to eliminate rules made obsolete by the development of competitive market forces,[7] the CMRS spectrum cap must be repealed.

Further enforcement of the CMRS spectrum cap is no longer appropriate given a wireless market in which 70 percent of Americans have a choice of at least five competing mobile phone providers, and at least 11 million people can choose from among seven different providers.[8] Given the substantial number of wireless carriers operating in every market and the vigorous

---

5 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers; Cellular Telecommunications Industry Association's Petition for Forbearance From the 45 MHz CMRS Spectrum Cap; Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and Commercial Mobile Radio Service Spectrum Cap; Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Carriers, WT Docket No. 98-205, WT Docket No. 96-59, GN Docket No. 93-252, *Report and Order*, 15 FCC Rcd 9219 at ¶ 26 (1999) ("1998 Spectrum Cap Review Order").

6 Id. at ¶ 5.

7 See Staff Report at ¶ 1.

8 Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Fifth Report*, FCC 00-289 (rel. Aug. 18, 2000) at 6 ("Fifth CMRS Competition Report"); see also 1998 Spectrum Cap Review Order at ¶ 30 (noting that "[i]f there are five competitors [in a market], the likelihood of a cartel falls [from 100 percent] to 22 percent.").

competition for wireless customers, no single carrier possesses the power to engage in anticompetitive behavior. Moreover, with the addition of three new major operators with nationwide footprints in the last year, the Commission can be sure that dynamic competition will continue to flourish in this industry.[9]

In adopting the spectrum cap originally, the Commission sought to "discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency."[10] The Commission clarified this goal by explaining that the cap was not only intended to prevent anticompetitive behavior, but also to promote competition.[11] The cap has done so, and the market effects are irreversible. As demonstrated in the Fifth CMRS Competition Report, the price of mobile telephone service has declined in the last year by 11.3 percent after a 20 percent decline the previous year.[12] Over 32 percent of Americans subscribe to mobile wireless services and over 222 million people can choose from among three competing service providers.[13] As one Wall Street analyst recently proclaimed, wireless "[c]ompetition is here, and the market is still growing. Competition has broadened the market and expanded the

---

9 See Fifth CMRS Competition Report at 10-11.

10 Implementation of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment of Mobile Services; Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems In The 800 MHz Frequency Band; Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, GN Docket No. 93-252, PR Docket No. 93-144, PR Docket No. 89-553, *Third Report and Order*, 9 FCC Rcd 7988 at ¶ 251 (1994).

11 Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957 at ¶ 103 (1994).

12 Fifth CMRS Competition Report at 4-5.

13 Fifth CMRS Competition Report at 5-6.

overall mobile telephony market share. . . . there will likely be, on average, six or seven competitors in each market."[14]

In addition to the fact that the spectrum cap is no longer necessary to promote CMRS competition, continued enforcement of the cap could significantly affect the deployment of third generation mobile wireless services. CTIA wishes to emphasize particularly the potential that lifting the spectrum cap would have on the widespread and rapid implementation of advanced technologies and services that will benefit all consumers. The Chairman noted earlier this year that it is "time for us to think of wireless as the premier network for the 21st century."[15] In order to give effect to this notion, the Commission must permit incumbent CMRS providers -- carriers with technological expertise and strong track records in pioneering dynamic telecommunications solutions for consumers -- to move the American wireless sector to its next generation. To do this, carriers will likely need additional spectrum beyond what is presently permitted under the cap.[16] Without first giving carriers access to the spectrum, the advanced data services which can be delivered over wireless networks will not be realized by Americans. Accordingly, the cap should be removed to avoid constraining dynamism in mobile wireless services. This determination is fully within the Commission's control.

---

14 Hey Babe, Take a Walk on the Wireless Side, Credit Suisse/First Boston Equity Research at 44 (May 5, 2000); see also id. at 45 (noting that many operators continue to experience increased churn rates -- a clear demonstration of a fully functioning competitive market).

15 "Wire Less Is More," An Address by William E. Kennard, Chairman, Federal Communications Commission, to the Cellular Telecommunications Industry Association, New Orleans, Louisiana at 3 (Feb. 28, 2000) (as prepared for delivery).

16 See The Next Generation IV, Merrill Lynch at 46 (Mar. 10, 2000) ("If the world is really going wireless (and we believe that it is), then carriers need a lot of spectrum. Imagine if not only voice traffic went over wireless but also a significant amount of data traffic. As wireless moves more and more toward the Internet, there's no question with regards to spectrum, more is definitely better.").

The Commission's decision not to include spectrum auctioned in the 700 MHz band in the spectrum cap also supports lifting the cap for all services.[17] The Commission concluded that "opening this spectrum to as wide a range of applicants as possible will encourage entrepreneurial efforts to develop new technologies and services, while helping to ensure the most efficient use of the spectrum. . . . We are particularly concerned that eligibility restrictions could impede efficient development of this spectrum."[18] The same reasoning applies to this proceeding. By limiting the ability of carriers to expand their spectrum holdings, the Commission is, in effect, limiting the efficient allocation of all spectrum and hindering the ability of carriers to put CMRS spectrum to its highest and best use. Moreover, the disparity between the regulatory classification of 700 MHz spectrum and the spectrum at issue here is unsustainable in light of the Commission's express understanding that the 700 MHz band "may be used for mobile services comparable to the cellular, broadband PCS, and SMR spectrum for which the CMRS spectrum cap was devised."[19]

Clearly, continued enforcement of the spectrum cap is outdated. The level of competition between wireless providers no longer warrants a cap. The need for additional spectrum for advanced services necessitates lifting the cap. And, importantly, the Commission can continue to prevent undue concentration in the market through the use of its traditional horizontal ownership review processes.

---

17 Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd 476 at ¶ 52 (2000).

18 Id. at ¶¶ 49-50.

19 Id. at ¶ 51.

PART 22, SUBPART H -- CELLULAR RADIOTELEPHONE SERVICE

Section 22.941

The Commission staff has recommended that a comprehensive review be undertaken for all of the cellular service rules in Part 22. The staff has indicated that it will recommend that the Commissioners adopt a notice of proposed rulemaking to accomplish this task. CTIA looks forward to participating in that proceeding and anticipates working closely with the Commission and staff to ensure that the regulation of mobile wireless services is streamlined and promotes competition and the broader public interest.

Among the matters the staff intends to recommend for the proposed notice is whether the Commission should continue to manage the assignment of cellular system identification numbers (SIDs) under Section 22.941 of the Commission's Rules, 47 C.F.R. § 22.941. In addition to assigning SIDs, the Commission occasionally requires carriers to file SID information with it, rather than permitting the industry to handle the process itself. This process is unnecessary. Recording changes in SIDs and assigning new SIDs plainly need not be done by government. As has occurred with other functions the Commission has delegated to the private sector, privatizing cellular SID assignment would eliminate a Commission responsibility that can be done as effectively, if not more so, by the private sector. There is no particular reason why the Commission should continue to control this process. In fact, the ability of the private sector to administer SID assignments is evidenced by the fact that SID assignment for PCS carriers has always been a service provided by the private sector, namely, by CIBERNET.

Private management of cellular SID administration is not a novel proposition. The Commission originally proposed privatizing cellular SID management in 1994. It recognized "that this coordination function could just as well be performed by an industry organization

rather than by the Commission. Unfortunately, no organization offered to take over the SID code coordination function."[20] Today, CTIA proposes that its wholly owned subsidiary, CIBERNET, assume management responsibility for cellular SID assignment. TIA has assigned CIBERNET a range of SID numbers.[21] It is from this range that CIBERNET assigned SIDs to PCS carriers. Since CIBERNET is presently responsible for broadband PCS SID assignments, it is thus both logical and cost effective for CIBERNET to assume the responsibilities for cellular carriers as well.

---

20 See In the Matter of Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services; Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-common Carrier Service; Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service, CC Docket No. 92-115, *et al.*, *Report and Order*, 9 FCC Rcd 6513, 6574 (1994).

21 See "International Implementation of Wireless Telecommunications Systems Compliant With ANSI/TIA/EIA-41," TIA Technical Service Bulletin #29.

PART 24 -- PERSONAL COMMUNICATIONS SERVICES

Section 24.16

In 1999, CTIA petitioned the Commission to initiate a rulemaking proceeding to amend Section 24.16 of the Commission's Rules, 47 C.F.R. § 24.16, to bring the PCS and cellular renewal processes into conformity with each other. The Commission has not acted on the petition (appended hereto). CTIA respectfully requests that the Commission either include CTIA's petition in this biennial review or seek comment on the petition without further delay.

Briefly, CTIA explained in its petition that Section 24.16 needed to be amended to mirror the cellular renewal procedures found in Sections 22.935 through 22.940, 47 C.F.R. §§ 22.935-22.940. When the Commission adopted the PCS renewal rules it stated that it was adopting a ten year license term and "provisions regarding renewal expectancy that currently apply to the cellular service."[22] Instead, the cellular renewal rules establish the content of renewal and competing applications as well as a two-step process for resolving renewal challenges.[23] Under the two-step renewal process, a threshold determination is made whether the incumbent renewal applicant deserves a renewal expectancy.[24] The incumbent is entitled to this expectancy if it has (1) provided "substantial service," and (2) substantially complied with applicable Commission rules, policies, and the Communications Act over the license term.[25] If a renewal expectancy is

---

22 Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700 at ¶ 131 (1993).

23 See 47 C.F.R. §§ 22.935, 22.936, 22.937, 22.939, 22.940.

24 47 C.F.R. § 22.935(c). The rules stipulate that this renewal expectancy will be "the most important factor" in determining whether to award a cellular license to a renewal applicant or challenger. Id.

25 47 C.F.R. § 22.940(a)(1)(ii).

awarded, competing applications are dismissed.[26] In other words, the second step of the process only occurs if a renewal expectancy is not awarded to the incumbent operator.[27]

The PCS renewal requirements discuss only a carrier's renewal expectancy and nothing more.[28] Principles of regulatory symmetry require that this disparity be corrected. Regulatory symmetry, i.e. differences in regulation must be based upon relevant differences in circumstances, require that the Commission regulate cellular services in a manner similar to its regulation of other carriers offering comparable services and subject to similar competitive forces. Without such symmetry, the Commission's regulations will disadvantage certain carriers through artificial regulatory constraints. There can be no doubt in this instance that the regulation of cellular and PCS, and specifically the renewal rights of cellular and PCS carriers, must be governed by these principles. As such, the Commission should address, either in this proceeding or through a separate rulemaking proceeding, CTIA's petition for rulemaking on this matter.

---

26 47 C.F.R. § 22.935(c).

27 47 C.F.R. §§ 22.935(c); 22.940(b).

28 See 47 C.F.R. § 24.16.

PART 1, SUBPART I -- PROCEDURES IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA)

In addition to implementing the NEPA requirements, the Commission's Part 1, Subpart I rules require carriers to carry out Environmental Assessments (EA) pursuant to the Commission's obligations under the National Historic Preservation Act (NHPA).[29] As the Staff Report explains,[30] recent efforts have been undertaken by the Commission and telecommunications carriers to conform these requirements with the NHPA and with the Advisory Council on Historic Preservation, created by the NHPA ("Advisory Council"). These efforts have led the Commission to pursue a programmatic agreement with the Advisory Council that is expected to streamline compliance obligations for all telecommunications carriers. CTIA has supported these efforts and will continue to work closely with the Commission to ensure that the principles of the NHPA are carried out fully.

Through these recent efforts, it has become apparent that the existing requirements, as both written in the rules and implemented by the Commission, may have failed to properly carry out the Commission's duties under the Communications Act and the NHPA. Under Section 110(d) of the NHPA, all federal agencies are required to further the purposes of the historic preservation in a manner that is "[c]onsistent with the agency's mission and mandates."[31] In practice, however, the FCC has been too deferential to the Advisory Council, allowing it to take

---

29 See 47 C.F.R. § 1.1307(a)(4).

30 See Staff Report at Appendix IV, 9.

31 16 U.S.C. § 470h-2(d); see The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act; Part III, 63 Fed. Reg. 20496, 20500 (Apr. 24, 1998) ("An agency historic preservation program must include specific provisions to ensure, to the extent feasible given the agency's mission and mandates, the full consideration and appropriate preservation of . . . historic properties affected by the agency's actions.) (emphasis added).

a lead role in wireless tower siting decisions and permitting it to make decisions with regard to historic preservation that are not consistent with the Commission's mission and mandates as established in the Communications Act. Ultimate decision making authority lies with the Commission. The Commission's rules must be amended to reflect this.

The proposed programmatic agreement with the Advisory Council must be consistent with the statutory mandate and the FCC's rules and policies governing the biennial review. Accordingly, the proposed programmatic agreement should provide for a streamlined regulatory process with respect to the EA requirements, eliminate duplicative filings, and eliminate such regulations that are no longer in the public interest. For example, the FCC currently requires licensees to file an EA when: 1) the State Historic Preservation Office (SHPO) has determined "no adverse effect" to the historic property; 2) there is a finding of "adverse impact" and the SHPO and licensee have entered into a Memorandum of Agreement to mitigate such impact; or 3) licensees attempt to co-locate on a structure already designated as a "disturbed" area. After the licensee goes through the formality of filing an EA under these circumstances, the Commission takes an additional 60 to 90 days to process the EA. Thus, construction is unnecessarily delayed for an additional 60 to 90 -- a considerable amount of time in the competitive wireless market.

CTIA offers the following initial suggestions for streamlining the regulatory process:

- Carriers should not be required to file an EA in instances where the SHPO has determined that the proposed facility will not adversely affect a historic property. The SHPO shall provide the carrier with a letter of certification indicating that the proposed facility will not adversely affect the historic property. The carrier may use the letter of certification to support its application before local, municipal and state zoning authorities and before the Commission.

- If a SHPO determines that a proposed wireless facility has an adverse impact on a historic property, carriers should not be required to file an EA under the following circumstances: 1) technically and economically feasible methods to mitigate the

adverse impact are available; and 2) the SHPO and carrier mutually agree on the type of mitigation measures.

In addition, CTIA supports excluding certain categories of construction from the EA process. By defining siting activities that would qualify as categorical exclusions under the proposed programmatic agreement, the Commission and the Advisory Council would provide the appropriate incentive for carriers to site wireless facilities within areas that fall within such categorical exclusions. Below is a preliminary list of proposed siting activities that, based on the collective experience of industry experts, should qualify as categorical exclusions. In many instances, the Advisory Council's programmatic agreements with the National Park Service and General Services Administration are precedents supporting the list of categorical exclusions listed below.

- Installation of antennas not visible from public buildings (verified by sight-line study) and not anchored to historic materials;
- Installation of new wireless telecommunications facilities in areas designated as previously disturbed areas or within existing rights-of-way corridors of utility lines, transmission lines and pipe lines;
- Co-location of a new wireless telecommunications antenna on an existing monopole or tower;
- Attachment of antenna to an existing telecommunications structure;
- Installation of a wireless telecommunications structure, *e.g.*, monopole or lattice tower, in which the structure is located within 1 mile of an existing radio, television or telecommunications tower where the new structure is no higher than the existing structure;
- Installation of a wireless telecommunications structure or antenna in an existing antenna farm located on or within 1 mile of a historic property. The burden should be on the SHPO to demonstrate a significant impact of an additional antenna or structure on the historic property;
- Installation of a wireless telecommunications structure or antenna on Federal lands or buildings, subject to the Federal agency's right-of-way regulations;

- Installation of a wireless telecommunications structure or antenna on unrecorded or previously unknown archaeological sites;
- Modifications to existing wireless telecommunications structure. The burden should be on the SHPO to demonstrate that the modification will have a significant impact on the historic property;
- Installation of a wireless telecommunications structure or antenna in an area designated by a municipality as a zoned commercial or industrial area;
- Temporary installation of a wireless telecommunications facility for special use, special purpose or emergency situations; and
- The historic property is more than one-mile radius from the proposed siting facility or the proposed facility is not visible with the naked eye from the historic property.

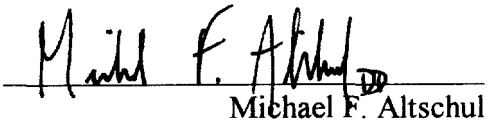
Ultimately, the amendment of the Commission's Rules must incorporate the requirements of the NHPA, the rules of the Advisory Council, and importantly, the mission and mandates of the Commission. Adopting the above-listed conditions into a programmatic agreement and into the Commission's Rules will secure Congress' intentions as demonstrated in the NHPA and will streamline the regulatory obligations of CMRS providers.

CONCLUSION

The Section 11 biennial review process provides the Commission with an opportunity to examine the continued efficacy of its rules. CTIA endorses the principles the Commission has pledged to follow in determining whether to eliminate or modify regulations such as the spectrum cap and believes it reflects sound policy decision making. CTIA anticipates working closely with the Commission and staff to ensure that regulation of the CMRS industry appropriately balances the Commission's public interest obligations with the deregulatory mandates of the Communications Act.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION



Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 785-0081

Its Attorneys

October 10, 2000

ATTACHMENT

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Extend the Part 22 Cellular Renewal Rules to the Part 24 Personal Communications Service	)	RM _____

PETITION FOR RULEMAKING

In accordance with Section 1.401 of the Commission's rules, the Cellular Telecommunications Industry Association ("CTIA"),[32] by its attorneys, hereby petitions the Commission to initiate a rulemaking to make the Personal Communications Service ("PCS") rules dealing with license renewals consistent with those governing the cellular service. A rulemaking is necessary to ensure regulatory parity for similar services and to effectuate the Commission's previous decision to subject PCS to the cellular renewal procedures. Accordingly, CTIA requests that the Commission begin a new rulemaking and propose amending Section 24.16 to cross-reference the cellular renewal rules contained in Sections 22.935 through 22.940.

INTRODUCTION

During 1992 and 1993, the Commission conducted two rulemakings that dealt with renewal procedures. The first proceeding examined in detail the renewal procedures for the cellular service. The second proceeding created the new Personal Communications Service which was intended to compete directly with the cellular service.

---

[32] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

ATTACHMENT

In the cellular proceeding, the Commission amended Part 22 to set forth detailed rules governing the cellular license renewal process.[33] These rules, contained in Sections 22.935-22.940, govern the content of renewal and competing applications for a cellular license, as well as a two-step process for resolving renewal challenges.[34] Under the two-step renewal process, a threshold determination is made whether the incumbent renewal applicant deserves a renewal expectancy.[35] The incumbent is entitled to this expectancy if it has (1) provided "substantial service,"[36] and (2) substantially complied with applicable Commission rules, policies, and the Communications Act over the license term.[37] If a renewal expectancy is awarded, competing

---

33 *Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, CC Docket No. 90-358, *Report and Order*, 7 F.C.C.R. 719 (1992) ("*First Cellular Renewal Order*"); *Memorandum Opinion and Order on Reconsideration*, 8 F.C.C.R. 2834 (1993) ("*Cellular Renewal MO&O*"); *Memorandum Opinion and Order on Further Reconsideration*, 9 F.C.C.R. 4487 (1994) ("*Further Reconsideration*").

34 *See* 47 C.F.R. §§ 22.935, 22.936, 22.937, 22.939, 22.940. The Commission initially rejected the adoption of a two-step renewal procedure as inconsistent with Section 309 of the Communications Act, as interpreted in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971). *First Cellular Renewal Order*, 7 F.C.C.R. at 725 (*Citizens* held that competing applications for broadcast licenses cannot be dismissed without a hearing). On reconsideration, however, the Commission "carefully reassess[ed] *Citizens*" and stated that it no longer believed that "adoption of the two-step procedure for comparative renewal proceedings . . . is necessarily inconsistent with *Citizens*" for common carrier licenses. *Cellular Renewal MO&O*, 8 F.C.C.R. at 2836. This issue has now been effectively mooted by the Telecommunications Act of 1996 since competing broadcast renewal applications are now prohibited if the incumbent is granted a renewal expectancy. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); H.R. Conf. Rep. No. 104-458, at 164 (1996).

35 47 C.F.R. § 22.935(c). The rules stipulate that this renewal expectancy will be "the most important factor" in determining whether to award a cellular license to a renewal applicant or challenger. *Id.*; *see Cellular Renewal MO&O*, 8 F.C.C.R. at 2834, 2837-38. The Commission found that the two-step procedure flowed from "the logic of a renewal expectancy." *First Cellular Renewal Order*, 7 F.C.C.R. at 721-22.

36 47 C.F.R. § 22.940(a)(1)(i). Pursuant to this section, "'Substantial' service is defined as service which is sound, favorable, and substantially above mediocre service. . . ." *Id.*

37 47 C.F.R. § 22.940(a)(1)(ii).

applications are dismissed.[38] In other words, the second step of the process only occurs if a renewal expectancy is not awarded to the incumbent operator.[39] To avoid uncertainty during the renewal process, the Commission stayed the effectiveness of these rules "until th[e] Order is final and no longer subject to judicial review."[40] The stay was eliminated on June 13, 1994,[41] after the only appeal was voluntarily dismissed.

Shortly after commencement of the cellular proceeding, the Commission released an *NPRM* proposing the establishment of the new Personal Communications Service.[42] The Commission proposed various methods for awarding initial licenses, but indicated that if it opted for competitive bidding, licenses could be renewed using the cellular renewal procedures and expectancy.[43] In this regard, the Commission proposed to award PCS licenses for "a 10-year license term with a renewal expectancy similar to the one applied to cellular telephone licenses."[44] The Commission indicated that unless cellular licensees received a high probability of renewal for operating in substantial compliance with FCC rules, "investors would be reluctant to make investments in equipment, training and marketing specific to a particular PCS system."[45]

---

38 47 C.F.R. § 22.935(c).

39 47 C.F.R. §§ 22.935(c); 22.940(b).

40 *Cellular Renewal MO&O*, 8 F.C.C.R. at 2836.

41 *See Further Reconsideration*, 9 F.C.C.R. at 4487 n.1, 4490.

42 *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Notice of Proposed Rulemaking and Tentative Decision*, 7 F.C.C.R. 5676 (1992) ("*PCS NPRM*").

43 *Id.* at 5769. The Commission ultimately decided to award PCS licenses pursuant to competitive bidding. *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, PP Docket No. 93-253, *Fifth Report and Order*, 9 F.C.C.R. 5532 (1994).

44 *PCS NPRM*, 7 F.C.C.R. at 5707.

45 *Id.* at 5707-08. Around the same period, Congress amended the Communications Act to require "regulatory parity" for similar commercial mobile radio services. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Sec. 6002(b)(2)(A),

ATTACHMENT

In September 1993, the FCC established renewal and other rules for the new PCS service.[46] According to the Commission:

> We continue to believe that our proposed license term and a significant renewal expectancy are appropriate for the PCS service. This relatively long period and high renewal expectancy will provide a stable environment that is conducive to investment, and thereby will foster the rapid development of PCS. Accordingly, we are adopting the 10-year license term for PCS and *provisions regarding renewal expectancy that currently apply to the cellular service.*[101]

---

101 We recognize that we stayed in part, on our own motion, the cellular renewal expectancy rules pending judicial review. If those rules are reversed in court, we will have time to adopt new renewal expectancy rules for PCS before the 10-year license term expires.[47]

6002(b)(2)(B), 107 Stat. 312, 392 (1993), which substantially amended Section 332 of the Communications Act. In implementing the statute, the Commission concluded that this Congressional mandate requires symmetrical regulation of PCS and cellular services. *See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1418 (1994); *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications,* GN Docket No. 94-90, *Report and Order,* 10 F.C.C.R. 6280, 6290, 6300 (1995); *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act — Competitive Bidding,* WT Docket No. 96-18; PR Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order,* 14 F.C.C.R. 10030, 10036 (1999). As a result, the Commission has consistently imposed similar regulations on these two services. *See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Second Report and Order*, 8 F.C.C.R. 7700, 7715, 7725, 7727, 7742-47, 7764 & n.120 (1993)("*Second Report*"); *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, *Report and Order*, 12 F.C.C.R. 15668 (1997) ("*PCS Remand Order*") (extending LEC separation requirements to PCS).

46 *Second Report*, 8 F.C.C.R. at 7753.

47 *Id.* at 7753 (emphasis added).

As indicated above, the Commission specifically referenced the cellular renewal rules, as reconsidered, as the basis for the PCS renewal rules. The Commission also indicated that if the cellular rules were overturned, it would need to adopt new PCS rules.

Nevertheless, the PCS renewal rules the Commission adopted do not match-up with what was apparently intended. The Commission only adopted a single PCS renewal rule — Section 24.16.[48] This rule merely contains a discussion of the criteria for a renewal expectancy and its relative importance in a comparative proceeding. The rule does not discuss the procedures to be used if a renewal application is challenged or the basic qualifications and filing requirements for competing applicants. Thus, the cellular and PCS rules are not symmetrical[49] and action needs to be taken to clarify this matter well before PCS renewal applications are due and competing applications are filed.

DISCUSSION
THE PCS RENEWAL RULE MUST BE MODIFIED TO CONFORM TO THE CELLULAR RENEWAL RULES

---

[48] Section 24.16 provides:

> A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, which is the most important comparative factor to be considered in the proceeding, if its past record for the relevant license period demonstrates that the renewal applicant:
>
> (a) Has provided "substantial" service during its past license term. "Substantial" service is defined as service which is sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal; and
>
> (b) Has substantially complied with applicable Commission rules, policies and the Communications Act.

47 C.F.R. § 24.16.

[49] *Compare* 47 C.F.R. § 24.16 *with* 47 C.F.R. §§ 22.935-22.940.

ATTACHMENT

At present, the cellular renewal rules address the entire renewal process — from the contents of renewal applications to the two-step process to be followed if competing applications are filed. The two-step process is explained in detail with the first-step involving whether a renewal expectancy should be awarded. In contrast, there is only a single PCS renewal rule that addresses little more than the criteria for a renewal expectancy. The following chart graphically depicts the problem:

	CELLULAR	PCS
License Term	Section 1.955(a)(1)	Section 1.955(a)(1) Section 24.15
Renewal Expectancy	Section 22.940	Section 24.16
Components of a Renewal Expectancy Exhibit	Section 22.940	None
Comparative Hearing Procedures	Section 22.935	None
Competing Applications	Section 22.940 Section 22.937(g) Section 22.939	None
Procedures Governing Dismissal of Renewal Applications	Section 22.936	None

The asymmetry reflected above was neither intended nor is it logical given the similarity of the two services. A rulemaking should thus be started to square the PCS renewal rules with the cellular rules. Otherwise, the PCS renewal rule may be deemed defective or the Commission may be required to conduct full comparative hearings whenever competing applications are filed.[50]

In the *Second Report* setting forth the rules for PCS, the Commission indicated that it wanted the cellular and PCS renewal rules to be symmetrical.[51] Apparently, because the cellular rules were stayed pending appeal, the Commission only adopted one portion of the cellular

---

50 *See McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987).

51 *Second Report*, 8 F.C.C.R. at 7753.

renewal rules and failed to extend the entire cellular renewal program to PCS. CTIA requests that this oversight be corrected by replacing the text of Section 24.16 with the following:

> The PCS renewal process shall be governed by the cellular renewal rules set forth in Sections 22.935 through 22.940.

Amending the rules in this fashion will obviously square the renewal rules for both services.[52] This approach will ensure (i) that renewal expectancies for both services are awarded based on the same criteria, and (ii) that, like cellular licensees, PCS licensees will be subject to the two-step hearing process when competing applications are filed.

To avoid uncertainty with regard to the PCS renewal process, the procedures and filing requirements need to be clarified so that licensees, after making substantial investments during their license term, are not unnecessarily caught up in a regulatory quagmire if competing applications are filed.[53] Congress amended the Communications Act in 1996 to eliminate this uncertainty for broadcast licensees.[54] It directed the FCC to grant broadcast renewal applications, and prohibit comparative hearings, where the incumbent licensee is found deserving of a renewal expectancy. If competing applications do not need to be entertained with respect to broadcast renewals, there should be no legal impediment to using the cellular two-step renewal process for PCS. Accordingly, the Commission should initiate a rulemaking to extend the cellular renewal rules to PCS.

Finally, the Commission "has consistently found that section 332 of the Act requires that similar types of mobile service, such as broadband PCS and cellular, be regulated similarly."[55]

---

52 *See PCS NPRM*, 7 F.C.C.R. at 5769; *Second Report*, 8 F.C.C.R. at 7753.

53 Compare this situation with broadcast comparative hearing cases after *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993). In these cases, there are no clear criteria for comparing applicants. *See Reading Broadcasting, Inc.*, 14 F.C.C.R. 7176 (Video Serv. Div. 1999).

54 *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); H.R. Conf. Rep. No. 104-458, at 164 (1996).

55 *Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act to Provide In-Region InterLATA Services In Louisiana,* CC Docket No. 97-231, *Memorandum Opinion and Order*, 13 F.C.C.R. 6245, 6290 n. 259 (1998);

The FCC and the courts also have made clear that they view cellular and PCS as essentially fungible.[56] Therefore, subjecting cellular and PCS licensees to different renewal rules is contrary to the FCC's announced policy of like treatment of like wireless services.

The inconsistency between the cellular and PCS renewal rules appears to be an inadvertent oversight. The Commission has proffered no reasons for treating cellular and PCS licensees differently at renewal, while suggesting repeatedly that they should be treated alike.[57] Thus, the FCC bears a heavy burden if it intends to subject PCS and cellular licensees to different renewal procedures. Accordingly, the FCC should initiate a rulemaking to square the PCS renewal rules with those applicable to the cellular service.

---

see, e.g, Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1413 (1994); *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Third Report and Order*, 9 F.C.C.R. 7988, 7992, 7994 (1994); *PCS Remand Order*, 12 F.C.C.R. at 15691-92; *Eligibility for the Specialized Mobile Radio Services*, GN Docket No. 94-90, *Report and Order*, 10 F.C.C.R. 6280, 6290, 6300 (1995).

56 *Second Report*, 8 F.C.C.R. at 7715, 7725, 7727, 7742-47, 7764 & n.120; *see Cincinnati Bell Telephone v. FCC*, 69 F.3d 752 (6th Cir. 1995).

57 *See, e.g., Second Report*, 8 F.C.C.R. at 7715, 7725, 7727, 7742-47, 7764 & n.120; *PCS Remand Order*, 12 F.C.C.R. at 15691-92. Indeed, the FCC's only attempt to subject PCS and cellular service to disparate regulation was struck down. *Cincinnati Bell,* 69 F.3d 752.

ATTACHMENT

CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission initiate a rulemaking proposing to amend Section 24.16 in a manner that makes clear that the PCS renewal process will be governed by the cellular renewal rules set forth in Sections 22.935 through 22.940.

Respectfully submitted,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

Michael F. Altschul
Vice President, General Counsel

Randall S. Coleman
Vice President for
Regulatory Policy and Law

1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 785-0081

Its Attorneys

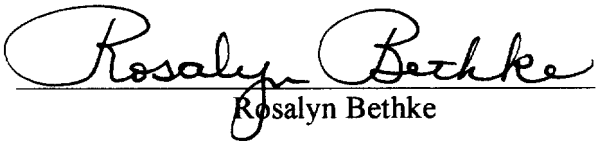
December 21, 1999

CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 10th day of October, 2000, copies of the attached document were served by hand delivery on the following parties:

Magalie Roman Salas, Secretary
Federal Communications
Commission
445 Twelfth Street, S.W., TWA-325
Washington, DC 20554

Sheryl Todd
Accounting Policy Division
Common Carrier Bureau
Federal Communications
Commission
445 12th Street, S.W.
Washington, DC 20554



Rosalyn Bethke